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Materials for Criminal Law, Fall 2021

Volume 1

Professor Hamish Stewart

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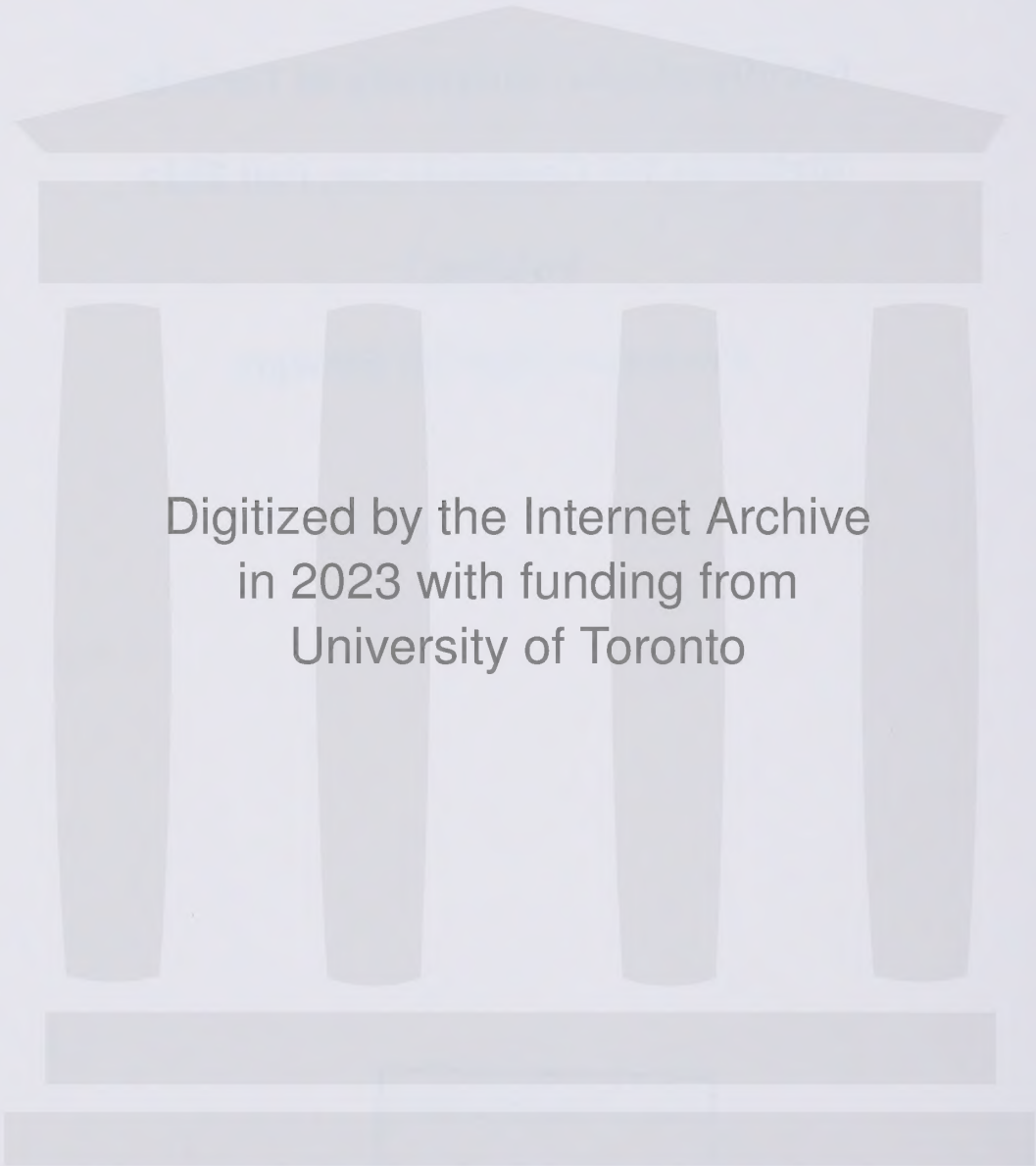
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CHAPTER 1: INTRODUCTION

1(a) Two Editorial Notes

The following notes are taken from earlier versions of these materials, prepared by Martha Shaffer, Hamish Stewart, Graham Mayeda, and Andrew Botterell.

A Note About These Materials

The criminal law is — as we hope you will discover — a fascinating and intellectually challenging subject; but it is also an emotionally and politically charged subject. Many of the cases you will read this term are disturbing because they involve violence, often violence of a sexual nature. The brutality in these cases is disturbing for those of us who have not experienced violence first-hand — it is often more disturbing for those of us who have.

Even though some of the cases in the materials are painful to read, they are included in this casebook because they are the leading cases in their area. As you will see, many of the leading cases throughout the criminal law involve sexual violence committed against women or children. We recognize that these cases may be particularly difficult to read and have sought to alert students by marking these cases with an asterisk (*). While our notation system will not make these cases any less troubling, we hope that forewarning readers will provide an opportunity to prepare for the disturbing nature of the material.

The cases contained in this casebook, unlike those in many other casebooks, are not heavily edited. We have chosen to construct our materials in this way because of our view that it is important for law students to work with full cases rather than to work from heavily edited snippets. As a result, the facts of the cases as set out by the court have seldom been edited. Since many of the cases involve sexual violence against women and children, the facts are sometimes sexually graphic. Again, we have included these cases — despite their explicitness — because we believe that they are essential to a thorough understanding of the criminal law.

Finally, most of the cases in these materials are decisions of appellate courts. This means that they are not transcriptions of what occurred at the accused's trial, but are discussions of points of law that have been argued when a verdict has been appealed.

We hope that you enjoy the study of the criminal law and we welcome your comments on the materials or lectures throughout the course.

M.S.
H.S.
G.M.
A.B.

A Note on the Text

Most of the materials in this volume are drawn from the reported reasons for judgment of appellate courts, particularly the Supreme Court of Canada. Reasons for judgment of appellate courts are typically made available to the public on-line and are usually "reported" (*i.e.*, published) in both official and unofficial series of law reports. In Canada, the decisions of the Supreme Court of Canada are officially reported, in English and French, in the Supreme Court Reports (S.C.R.), and are also readily accessible on-line through many sources, including CanLII (see https://www.canlii.org/en/ca/scc/). Decisions of provincial courts of appeal and other courts are not usually officially reported but are available on the Internet through the courts' websites or through CanLII, Westlaw, or LexisNexis Quicklaw.

The most important criminal cases at all levels of court are unofficially reported in the Canadian Criminal Cases (C.C.C.), originally published by Canada Law Book, and the Criminal Reports (C.R.), originally published by Carswell. The C.C.C.s provide comprehensive coverage of the criminal decisions of the Supreme Court of Canada and provincial courts of appeal, as well as significant decisions of trial courts. The C.R.s provide less comprehensive coverage, but include annotations and brief articles by leading Canadian academics and practitioners. Both of these reporters are now published by Thomson Reuters and are available through Westlaw.

Different law reporters have different formatting and citation conventions; in addition, unofficial law reporters provide numerous convenient features for the reader, such as headnotes and indexation, that are protected by copyright. In assembling the materials for these volumes, we have drawn on material that is in the public domain, and we have imposed our own formatting and citation conventions on the excerpts. Deletions from the source texts are indicated by a row of five asterisks.

Since the mid-1990s, most judicial decisions in the common law world (though not the United States) have been released with paragraph numbers assigned by the issuing court. Decisions released without paragraph numbers before that time sometimes have paragraph numbers retroactively assigned to them. We have used paragraph numbers wherever possible, for ease of reference.

We are the authors of all the material that is set in the Arial typeface and of all the footnotes.

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1(b) Trials and Appeals

Trials

The purpose of the criminal trial is to determine whether the Crown's allegation that the accused is guilty of a criminal offence is true. The Crown bears the burden of proving the factual elements of the offence beyond a reasonable doubt; correspondingly, the accused bears only the burden of raising a reasonable doubt, if necessary, about the Crown's allegations. The accused does not have to testify or offer a defence, but may simply argue that the Crown has not met its burden.

In every trial, there is a trier of fact and a trier of law. The trier of law is responsible for determining and instructing the trier of fact as to the applicable law, including the Crown's burden of proof and the proper approach to take in assessing evidence. The trial judge is always the trier of law. The trier of fact is responsible for determining the facts, based on the evidence, and rendering a verdict, based on the application of the law to the facts found. When the accused is tried by judge and jury, the jury is the sole trier of fact; while in a trial by judge alone, the judge must be the trier of fact as well as the trier of law.

Roughly speaking, questions of fact are questions about what happened, whereas questions of law are questions about the legal significance of what happened. Suppose, for example, that the accused is charged with murder, and the theory of the Crown is that the accused shot and killed the victim. Some of the relevant questions of fact might be: did the accused, or someone else, shoot the victim? If the accused was the shooter, what was his state of mind at the time? Was the victim in fact killed? Did the shooting cause the victim's death? Suppose the accused admits that he shot the victim, but claims self-defence. This strategy would make other facts relevant: did the victim threaten the accused? If so, how? Did the accused believe that he was being threatened? If so, how serious did he think the threat was, and was his belief in the threat reasonable? All of these questions would be for the jury, as trier of fact, to decide.

Some relevant questions of law in this hypothetical case might be the following: if the accused did not mean to shoot the victim, of what offence (if any) is he guilty? If the accused shot the victim intentionally but for some reason believed that the shooting would not kill the victim, of what offence is he guilty? If the accused believed that the victim was threatening to kill him, does that make any difference to his liability? All of these questions of law would be decided by the trial judge, based on the relevant cases, statutes, and constitutional principles, and the trial judge would then explain them to the jury. The jury would apply the law to the facts that it found.

Appeals

Most of the cases in these materials are decisions of the Supreme Court of Canada or of provincial courts of appeal. It is therefore useful to have a general overview of appellate procedure. This note deals only with the most frequently encountered aspects of appeals from proceedings by way of indictment; for an overview of other appeal rights and other remedies, see Mewett and Nakatsuru's *Introduction to the Criminal Process in Canada*, 4th ed., Chapter 19.

Questions of Law and Questions of Fact

Potential appellants must always ask whether their grounds of appeal involves a question of law or a question of fact, because their rights of appeal will depend on the answer to this question. Appeals based on questions of law are generally concerned with the trial judge's instructions to the trier of fact or with procedural questions such as the admissibility of evidence, while appeals based on questions of fact are concerned with the facts found by the trier of fact. Because the jury renders only a verdict (guilty or not guilty) it is often difficult to be sure exactly what facts they found. A judge sitting alone will usually report the specific findings of fact on which his or her verdict is based.

Appeals to the Court of Appeal in Proceedings By Way of Indictment

The Accused's Right of Appeal

A person convicted of an indictable offence may appeal, as of right, to the Court of Appeal, "on any ground of appeal that involves a question of law alone" (s. 675(1)(i)). Typical grounds of appeal on a question of law would be that the jury was improperly instructed about the elements of the offence, about permissible and impermissible uses of evidence, or about the admissibility of evidence. The accused may also appeal on a question of fact or a question of mixed law and fact, but leave to appeal is required (s. 675(1)(ii)). Questions of mixed law and fact are difficult to define, but generally speaking involve the application of a legal standard, particularly one containing an inexact term such as "reasonable", "obscene", or "undue", to the facts.

The Crown's Right of Appeal

If the accused is acquitted, the Crown may appeal, as of right, on a question of law alone (s. 676(1)(a)). So the Crown, like the accused, can appeal on questions such as the admissibility of evidence and the trial judge's instructions concerning the elements of the offence. The Crown has no right to appeal a finding of fact. For example, if the accused is acquitted of murder, the Crown cannot appeal on the ground that, based on the evidence, the jury should have found that the accused had an intention to kill. Many of the Canadian cases in these materials are Crown appeals from acquittals; in reading those cases, please keep in mind the limited scope of a Crown appeal.

The Powers of the Court of Appeal

An appeal from conviction may be allowed if the verdict was unreasonable or unsupported by the evidence, if there was an error of law, or if there was a miscarriage of justice (s. 686(1)(a)). Where an appeal is allowed, the Court of Appeal may either order a new trial, or may simply direct that the accused be acquitted (s. 686(2)).

An appeal from conviction may be dismissed where none of the three grounds just mentioned applies (s. 686(1)(b)(ii)). The appeal may also be dismissed if one of these

three grounds does apply, but "the court ... is of the opinion that no substantial wrong or miscarriage of justice has occurred" (s. 686(i)(b)(iii), and compare s. 686(i)(b)(iv)).

The *Criminal Code* does not list any specific grounds for allowing or dismissing an appeal by the Crown, but recall that the Crown can only appeal on a question of law alone; thus, the Crown's appeal might be allowed where the Crown can demonstrate an error of law. But even in such a case, the Crown must show that "the error ... of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal." (*R. v. Graveline*, [2006] 1 S.C.R. 609 at para. 14.)

When the Crown's appeal is allowed, the Court of Appeal must order a new trial if the accused was acquitted by a judge and jury, and may order a new trial or enter a verdict of guilty if the accused was acquitted by a judge sitting alone.

Appeals to the Supreme Court of Canada

Whereas most appeals come to the Court of Appeal as of right, most appeals come to the Supreme Court of Canada with leave, which is not routinely granted. The Crown or the accused may appeal on a question of law, either with leave (ss. 691(1)(b), 691(2)(c), 693(1)(b)), or as of right when a judge of the court of appeal dissents (ss. 691(1)(a), 691(2)(a), 693(1)(a)). In addition, an accused who is acquitted at trial, but who is found guilty by the Court of Appeal, may appeal to the Supreme Court of Canada as of right (s. 691(2)(b)). Neither the accused nor the Crown may appeal on questions of fact. The powers of the Supreme Court of Canada in criminal appeals are essentially the same as those of the Court of Appeal (s. 695).